

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY THOMAS MALM,

Appellant.

No. 38625-9-II

UNPUBLISHED OPINION

Hunt, J. – Anthony Thomas Malm appeals the trial court’s revocation of his suspended sentence under the Special Sex Offender Sentencing Alternative<sup>1</sup> (SSOSA). He argues that the trial court (1) denied his due process right to confront witnesses when it relied on hearsay in his status report, (2) failed to enter written findings, and (3) failed to consider probation violation sanctions as an alternative to revoking his suspended sentence. He asks us to remand for a new revocation hearing. We affirm.

**FACTS**

On July 1, 2004, the State charged Anthony Thomas Malm, a 40-year-old teacher, with two counts of second degree child molestation of two of his 12- or 13-year-old female students.<sup>2</sup> On September 30, Malm pleaded guilty to both counts.

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<sup>1</sup> RCW 9.94A.670.

<sup>2</sup> These offenses occurred (1) between May 1 and 31, 2004; and (2) between April 26 and May 7, 2004.

## I. SSOSA Sentence

Malm had no known criminal history; he requested a SSOSA sentence. The State agreed to recommend a SSOSA. At the December 10 sentencing hearing, the trial court (1) granted Malm's SSOSA request; (2) imposed a 41-month<sup>3</sup> term of "total" confinement on each count, Clerk's Papers (CP) at 25;<sup>4</sup> (3) suspended these sentences and placed Malm on community custody "for the length of the suspended sentence or three years, whichever is greater," CP at 25; and (4) ordered Malm to participate in and to complete successfully "at least" three years of outpatient sex offender treatment with Macy's and Associates. CP at 26.

Malm's judgment and sentence advised him that the trial court could revoke his suspended sentence at any time during the term of community custody and execute the sentence if he (1) violated any conditions of the suspended sentence, or (2) failed to make satisfactory progress in his treatment program. The trial court set a treatment termination hearing for September 14, 2007.

## II. Interim Status Reports and Review Hearings

From December 2004 through April 2007, the trial court held several periodic review hearings. During this time, Malm appeared to be compliant with his treatment and community custody requirements. Also during this time, Malm's treatment provider, Robert Macy, a certified

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<sup>3</sup> Given Malm's offender scores of three (for the other current offenses), the standard range for each of his offenses was 31 to 41 months. RCW 9.94A.510; RCW 9.94A.515; former RCW 9.94A.525(16) (2002).

<sup>4</sup> The trial court also imposed 164 days of initial confinement, but it credited Malm with 164 days for time served.

sex offender treatment provider, submitted several status reports that were generally positive and indicated that Malm's treatment was progressing.

Starting in early April 2007, however, Macy began to express concern about Malm's participation and his ability to complete his sex offender treatment successfully while still under the trial court's jurisdiction. From July 2007 through November 2008, the trial court held a series of review hearings to determine whether it should allow Malm to continue treatment or whether it should revoke Malm's suspended sentence and reinstate the 41-month sentence of confinement.<sup>5</sup>

Macy's status reports from March until August 2008 indicated that Malm's treatment was progressing again. But by August 18, Macy reported that Malm's treatment was no longer progressing as well as anticipated: Testing showed that Malm was still significantly sexually aroused by female children, and he was "significantly behind in a periodical polygraph." CP at 113.

### III. September 23, 2008 Status Report and Violation

In September 2008, Malm reported to his community corrections officer (CCO) that he had intentionally interacted with two minor boys at work, which caused Macy to direct Malm to leave his job. On September 23, Macy submitted a status report to Malm's CCO stating that he (Macy) had significant concerns about Malm's treatment response and that Malm had violated one of his conditions by having direct, unsupervised contact with two young males.

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<sup>5</sup> During this period, the parties and the trial court frequently discussed how long the trial court had jurisdiction over Malm if it did not revoke the SSOSA. In January 2008, Malm stipulated that the trial court's jurisdiction continued until December 10, 2008. Later, however, he obtained new counsel and challenged the trial court's jurisdiction again. Although the length of the trial court's jurisdiction was a significant issue below, Malm does not raise any jurisdictional issues on appeal.

Macy stated that, although Malm was taking medication and seeking additional counseling for anxiety and depression, (1) his September 7 Phallometric Assessment showed significant deviant sexual arousal to coercion of female children, which “demonstrate[d] Mr. Malm’s pattern of not managing his deviant sexual arousal to minors,” CP at 122; (2) two to three times a month Malm was still having dreams about female minors, including his victims; (3) Malm’s wife reported that he was having suicidal thoughts and that he had felt suicidal for some time, which he had not reported to Mr. Macy, his treatment group, or his psychiatrist; and (4) the drugs Malm was taking did not appear to be working.

Macy expressed concern that, despite significant additional treatment, Malm continued to withhold information, to have purposeful contact with minors, to fail to manage his deviant sexual arousal, and to have depression and suicidal thoughts. Macy also reported that Malm was blaming Macy and his (Malm’s) psychiatrist for his arousal, depression, and poor judgment and that this blame projection was not a proper response given the length of Malm’s treatment. Macy concluded that, despite treatment, Malm was not a manageable risk and “not safe to be in the community” and that Malm’s treatment prognosis was not promising even if the trial court extended his treatment period. Report of Proceedings (Nov. 14, 2008) (RP) at 17. Macy recommended that (1) if the trial court’s choices were limited to prison time or release, imprisonment would be the better option to ensure community safety; and (2) if Malm wished to continue sex offender treatment, “it should be provided in a secure facility where the community’s children would not be at risk while [Malm] is managing his deviant sexual arousal, suicidal ideations, depression and disingenuous reporting.”<sup>6</sup> CP at 123-24.

This status report prompted Malm's CCO to file a notice of violation, alleging that Malm had failed to comply with treatment. Officers arrested Malm after he reported for a scheduled polygraph.<sup>7</sup> The CCO recommended that the trial court revoke Malm's suspended sentence.

#### IV. Revocation

On September 25, 2008, the State moved to revoke Malm's suspended sentence based on his failure to comply with the conditions or requirements of his suspended sentence. At the November 14, 2008 revocation hearing, Malm, through recently obtained new counsel, argued that (1) the trial court had lost jurisdiction over him on December 9, 2007, despite his earlier stipulation that the trial court's jurisdiction extended until December 2008; (2) the trial court had lacked authority to extend his treatment when it did; (3) the trial court's authority at the earlier hearings was limited to extending his community custody and the related conditions; and (4) the only sanction the trial court could have imposed at the earlier hearings was a 60-day term of confinement for any community custody violation.

After the trial court rejected Malm's arguments, the State reiterated that it was moving to revoke Malm's suspended sentence. Malm's CCO testified about Macy's September 23, 2008 status report. Malm's counsel commented that he could not argue with the status report because Macy was not at the hearing; Malm neither objected to the CCO's testimony about the report as hearsay nor argued that the trial court could not rely on the report.

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<sup>6</sup> Macy also indicated that he did not want the trial court or the CCO to release this status report to Malm while Malm was in the community because he (Macy) was concerned that Malm might view it as an abandonment or betrayal and respond by acting out on a child.

<sup>7</sup> Malm's responses to that final polygraph were also inconsistent with what he had told his CCO and Macy at other times, causing the CCO to question Malm's truthfulness.

Instead, Malm argued that (1) all of Macy's previous status reports were more positive; (2) the trial court was focusing on only the negative status reports; and (3) because he (Malm) could still be amenable to some other type of treatment, revocation was not necessary. Malm never asserted, however, that the trial court could impose any other type of sanction, such as a shorter term of confinement for a community custody violation, based on his failure to complete his treatment.

Believing that its jurisdiction over Malm would end on December 9, the trial court ruled:

So I don't think that, you know, alternative treatment options, that the Court has really any time. It seems to me that the Court has time to do one of two things, either release Mr. Malm from any further obligation or revoke his SSOSA and send him to prison. It seems to me those are my only two options given the time frame we're under and given that he apparently is still continuing to be aroused. I would agree with [the State] that he presents a very real risk. He has not benefited from treatment, and to release him into society, I think, is a risk for young children. So I'm going to revoke your SSOSA sentence.

RP at 22; *see also* RP at 20. The trial court entered an order revoking Malm's suspended sentence.<sup>8</sup>

Malm appeals.

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<sup>8</sup> This order contained no written findings explaining the trial court's decision.

## ANALYSIS

### I. Macy's Status Report

Citing *State v. Dahl*,<sup>9</sup> Malm argues that by allowing his CCO to testify about Macy's September 23, 2008 status report and relying on this hearsay, the trial court denied his due process right to confront Macy about inconsistencies in his report. This argument fails.

#### A. Waiver

At the November 14, 2008 revocation hearing, the trial court considered the CCO's testimony about Macy's status report. Malm's counsel stated that he could not "argue with Mr. Macy when he's not here." RP at 19. But Malm never specifically objected to the CCO's testimony relating the content of Macy's status report; nor did Malm object that the CCO's testimony about the report was inadmissible hearsay. On the contrary, Malm suggested that the trial court should consider all of Macy's status reports and correspondence, not just the September 23 status report. Malm now attempts to raise his hearsay and confrontation challenges for the first time on appeal. But because he failed to object to the trial court's consideration of Macy's September 23 status report,<sup>10</sup> offered through his CCO's testimony, Malm failed to preserve his hearsay claim of error for appeal. See ER 103(a); *State v. Dahl*, 139 Wn.2d 678, 687 n.2, 990 P.2d 396 (1999).

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<sup>9</sup> *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999).

<sup>10</sup> Moreover, Malm's counsel also attempted to use similar hearsay information during his argument.

## B. Harmless Error

Even if Malm could overcome this waiver bar, Macy's report was admissible and any error was harmless. Revocation of a suspended sentence or a SSOSA is not a criminal proceeding; thus, "[a]n offender facing revocation of a suspended sentence has only minimal due process rights" to ensure that a finding of violation is based on verified facts. *Dahl*, 139 Wn.2d at 683 (citing *State v. Nelson*, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985)).

Hearsay evidence is admissible at revocation hearings if good cause outweighs the defendant's right to confront and to cross-examine witnesses. *Nelson*, 103 Wn.2d at 765. Good cause exists when procuring the witness would be difficult and expensive and the State can show that the proffered evidence was demonstrably reliable or clearly reliable. *See Dahl*, 139 Wn.2d at 686 (quoting *Nelson*, 103 Wn.2d at 765). In balancing these competing interests, many courts have focused on the reliability of the hearsay evidence as the primary component of a good cause showing. *See Nelson*, 103 Wn.2d at 765. When there is "demonstrably reliable evidence," "the expense and difficulty in requiring a mental health therapist to testify in person at every [] hearing constitutes good cause for allowing" hearsay reports. *Nelson*, 103 Wn.2d at 765.<sup>11</sup>

To the extent Malm bases his argument on denial of his constitutional right to confront Macy about the content of his status report, this case differs significantly from *Dahl*, on which Malm relies. Our Supreme Court held that in revoking Dahl's SSOSA, the trial court "abridged Dahl's due process right to confrontation by considering [quadruple] hearsay allegations" of

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<sup>11</sup> We note that in *Dahl* our Supreme Court did not address the difficulty and expense of requiring a mental health therapist to testify in person because it held that Dahl had not preserved this issue for appeal. *Dahl*, 139 Wn.2d at 687 n.2.



indecent exposure incidents “without good cause”:

The only information the court had about the event was fourth hand: two girls reported an indecent exposure to a police officer, who informed Dahl’s CCO, who told [Dahl’s treatment provider], who included the incident in a treatment report. This treatment report was then relied upon by the judge at the revocation proceeding.

*Dahl*, 139 Wn.2d at 687. Here, in contrast, the trial court relied, in part, on Malm’s own admissions to his CCO and to Macy that he had intentionally interacted with two minor males at work,<sup>12</sup> which independently verified facts in Macy’s reports. Unlike the situation in *Dahl*, the trial court’s knowledge of the events underlying Macy’s recommendation that it terminate Malm’s SSOSA treatment did not come “entirely from unreliable hearsay”; accordingly, any error in the lack of Macy’s live testimony was harmless. *Dahl*, 139 Wn.2d at 688 (violation of minimal due process rights are subject to harmless error analysis); *see also Nelson*, 103 Wn.2d at 765 (good cause existed for not requiring live testimony when the evidence was demonstrably reliable and securing live testimony from mental health therapist was difficult and expensive).

We hold, therefore, that Malm’s belated hearsay and confrontation rights challenges to the trial court’s violation findings fail.

## II. Written Findings Not Required

Malm further argues that we should remand for entry of written findings because the trial court’s order revoking his suspended sentence does not state the basis of its decision. Again, we disagree.

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<sup>12</sup> Malm made some of his initial admissions about his suicidal ideation to his wife, who then reported them to Macy. Macy’s status report, however, suggests that Malm may have also discussed some of his suicidal ideation issues in group therapy. It is unclear whether Macy was involved in these group therapy sessions.

Due process required the trial court to state the factual basis of its decision revoking Malm's suspended sentence. *Nelson*, 103 Wn.2d at 767. Although our Supreme Court has encouraged courts to make such statements in writing, the trial court was not *required* to enter written findings. *Dahl*, 139 Wn.2d at 689 ("Although oral rulings are permitted, we strongly encourage judges to explain their reasoning in written findings."). Here, the trial court's oral ruling established that it revoked Malm's suspended sentence because he was not progressing in his sex offender treatment and because he continued to present a risk to the community. Because the trial court's oral ruling was sufficient to allow appellate review, its failure to state its factual basis in writing does not require remand.

### III. Sanctions

Finally, Malm argues that we must remand for a new hearing because the trial court failed to consider alternative sanctions under the probation violation statute, RCW 9.94B.040 (formerly RCW 9.94A.634 (2002), Laws of 2008, ch. 231 § 56), before revoking his suspended sentence. We disagree.

We review a trial court's decision to revoke a SSOSA suspended sentence for abuse of discretion. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court may revoke an offender's SSOSA at any time if it is reasonably satisfied the offender violated a condition of the suspended sentence. [*Dahl*, 139 Wn.2d at 683; RCW 9.94A.670(11)]. . . .

Nevertheless, it may be an abuse of discretion where, in selecting one particular sentencing option, the court erroneously believes that its alternatives are limited such that it fails to consider other legally available options. *See Badger*, 64 Wn. App. at 910.

*State v. Partee*, 141 Wn. App. 355, 361-62, 170 P.3d 60 (2007).

Malm is correct that the trial court had authority to impose sanctions other than revoking his suspended sentence, including 60 days of confinement for every violation under RCW 9.94B.040. But, unlike the defendants in *Partee* and *Badger*, Malm never requested this alternative sanction. *Partee*, 141 Wn. App. at 359 (defendant requested that the sentencing court impose additional confinement for each violation rather than revoke suspended sentence); *Badger*, 64 Wn. App. at 905 (defendant challenged trial court's "refusal" to impose alternative jail sanctions instead of original sentence).

And even if Malm had argued that the trial court should have imposed an alternative sanction of 60 days in jail, such a sanction was clearly unreasonable here because the trial court's authority over Malm was ending soon<sup>13</sup> and there was no possibility that Malm could successfully complete a new sex offender treatment program while the trial court retained authority over him unless the trial court revoked the suspended sentence. The trial court did not abuse its discretion by failing to consider, sua sponte, a sanction that was clearly unavailable under the circumstances of this case.

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<sup>13</sup> The trial court believed that its jurisdiction over Malm would end on December 9, 2008, if it did not revoke the suspended sentence. We note that Malm does not argue on appeal that the trial court's jurisdiction would have extended beyond December 9, 2008, had it chosen not to revoke the suspended sentence.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Hunt, J.

We concur:

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Bridgewater, P.J.

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Quinn-Brintnall, J.